



The following constitutes
the order of the court. Signed July 18, 2014

William J. Lafferty, III

William J. Lafferty, III
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re

BERKELEY DELAWARE COURT, LLC,
Debtor.

No. 11-07128
Chapter 7

FIRST CITIZENS BANK & TRUST
COMPANY, as assignee of
Christopher R. Barclay,
Chapter 7 Trustee of Berkeley
Delaware Court, LLC,
Plaintiff,

Adv. Pro. No. 13-04219

v.

EMIL SHOKOHI,
Defendant.

1080 DELAWARE LLC,
Plaintiff-In-Intervention

MEMORANDUM FINDING LEASE VOIDABLE

The Court heard cross motions for summary judgment in the
above-captioned adversary proceeding on April 21, 2014. The

1 appearances made are noted on the record. At the conclusion of
2 the hearing, the Court determined that relief was appropriate
3 under section 549 of the Bankruptcy Code because the lease of
4 real property, an apartment in a building previously owned by
5 Berkeley Delaware Court, LLC, the Debtor in the bankruptcy case
6 discussed below (the subject transaction) was a post-petition
7 transfer of property belonging to the estate, and that the
8 transfer was unauthorized because it was done in contradiction
9 of a court order. The transfer did not qualify for the
10 exemption established in subsection 549(c) because the transfer
11 was not made to a purchaser. For these reasons, the Court
12 found the transfer could be avoided pursuant to 549(a).
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15 At the conclusion of the hearing there was disagreement as
16 to whether the effect of the Court's ruling would be to render
17 the lease "void" from the outset, or voidable (ie. void as of
18 the date of the entry of summary judgment). The parties had
19 not previously addressed that issue in their briefs, and the
20 Court set a briefing schedule for parties to provide
21 authorities to support their respective position for that
22 issue. The Plaintiff-In-Intervention and Defendant submitted
23 supplemental briefs, docket number 91 and 93, respectively.
24 There was also an objection filed by the Plaintiff-In-
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1 Intervention as docket number 95. The disposition of this
2 issue renders the objection moot.

3 Background

4 Prior to commencement of this action, Berkeley Delaware
5 Court, LLC ("Debtor"), the Debtor in two prior bankruptcy
6 cases, owned real property in Berkeley, California, on which it
7 constructed and ultimately operated an apartment complex. On
8 November 5, 2009, well prior to completion of the project, the
9 Debtor filed its first chapter 11 bankruptcy in the Southern
10 District of California.¹ In an apparent recognition of the
11 difficulties inherent in attempting to confirm a plan in a
12 single asset real estate case in which the senior secured
13 lender is undersecured, and holds a deficiency claim large
14 enough to control any unsecured class in a plan, the Debtor and
15 the secured lender, First-Citizens Bank & Trust Company
16 ("First-Citizens"), came to an arrangement whereby the chapter
17 11 case was dismissed, the Debtor was given a set amount of
18 time to sell or refinance the real property and the lender was
19 given a deed in lieu of foreclosure that was placed into
20 escrow, to be delivered to lender if the Debtor did not timely
21 pay off the loan. In addition, in order to preserve the status
22 quo and ensure First-Citizen's ability to take the property

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¹ *In re Berkeley Delaware Court, LLC*, Case No. 09-17100-LA11, Doc. 1,
(Bankr. S.D. Cal. Nov. 5, 2009).

1 with as few burdens as possible the Debtor agreed not to
2 encumber the property with leases, without the express written
3 consent of First-Citizens.² An order was entered on June 28,
4 2010, approving this agreement. The first bankruptcy case was
5 dismissed shortly after the June 28 order was issued. An order
6 voluntarily dismissing the case was entered on September 9,
7 2010, and the case was closed on September 14, 2010.³

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9 Unfortunately, the Debtor was unable timely to pay off
10 First-Citizens and, facing default under the negotiated
11 compromise, and apparently seeking to prevent delivery of the
12 deed in lieu to the lender, on April 29, 2011, the Debtor filed
13 a second chapter 11 bankruptcy case.⁴ The Debtor neither timely
14 commenced payments to First-Citizens, nor timely proposed a
15 confirmable plan within the meaning of section 362(d)(3), and
16 the Court concluded that it was required to grant relief from
17 stay to lender by order entered on August 11, 2011.⁵ This
18 development notwithstanding and notwithstanding the prior court
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21 ² An Order on Approval of Post-Petition Financing & Compromise of
22 Pending Litigation was entered by the bankruptcy court on June 28,
23 2010. *In re Berkeley Delaware Court, LLC*, Case No. 09-17100-LA11, Doc.
24 100 (Bankr. S.D. Cal. June 28, 2010). According to a settlement
25 agreement entered into between a Chapter 7 Trustee and First Citizens
26 Bank & Trust Company in a subsequent bankruptcy case, the Compromise of
27 Pending Litigation effectively sold the property to First Citizens, and
28 prohibited the Debtor from leasing the property. *First Citizens Bank v. Shokohi*, Adv. P. No. 13-04219, Doc. 81-2, Ex. C. (Bankr. N.D. Cal. Feb. 20, 2013).

³ *In re Berkeley Delaware Court, LLC*, Case No. 09-17100-LA11, Doc. 103 (Bankr. S.D. Cal. Feb. 20, 2013).

⁴ *In re Berkeley Delaware Court, LLC*, Case No. 11-07128-LA7, Doc. 1, (Bankr. S.D. Cal. Apr. 29, 2011).

⁵ *Id.* at Doc. 32.

1 approved restriction on leasing the property, an agent for the
2 Debtor entered into a lease agreement with the Defendant on
3 September 5, 2011.⁶ Pursuant to the lease agreement, the
4 Defendant moved into an apartment on the property, and has
5 remained in possession thereof from then to the present time.
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7 For reasons not germane to this matter, the court
8 converted the case to one under chapter 7 on March 2, 2012.⁷
9 During the spring of 2012, Plaintiff-In-Intervention, 1080
10 Delaware LLC, purchased the Real Property from First-Citizens.
11 Although not every aspect of the transaction has been
12 explained, it appears the purchase agreement required First-
13 Citizens to take further action regarding the lease encumbering
14 the property. After discussion with representatives of First-
15 Citizens in November 2012, a settlement agreement was entered
16 into between the Chapter 7 Trustee and First-Citizens which
17 transferred to First-Citizens the Trustee's power to avoid
18 post-petition transactions under section 549 of the Bankruptcy
19 Code. The agreement was approved by the bankruptcy court on
20 November 26, 2012.⁸
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23 Well before the transactions described in the preceding
24 paragraph, First-Citizens attempted to void the lease in state
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26 ⁶ *First Citizens Bank v. Shokohi*, Adv. P. No. 13-04219, Doc. 81-2, Ex.
C. (Bankr. N.D. Cal. Feb. 20, 2013).

27 ⁷ *In re Berkeley Delaware Court, LLC*, Case No. 11-07128-LA7, Doc. 123,
(Bankr. S.D. Cal. Apr. 29, 2011).

28 ⁸ *In re Berkeley Delaware Court, LLC*, Case No. 11-07128-LA7, Doc. 172,
(Bankr. S.D. Cal. Apr. 29, 2011).

1 court. On January 23, 2012, First-Citizens brought an action
2 in state court in an attempt to have the lease between Mr.
3 Shokohi and the Debtor declared void. The Alameda County
4 Superior Court dismissed the case holding First-Citizens could
5 not pursue a section 549 action in state court. Additionally,
6 four other actions involving the property are pending in
7 Alameda County Superior Court: a cross-complaint for emotional
8 distress filed by Mr. Shokohi in the aforementioned case, an
9 action by Mr. Shokohi for declaratory and injunctive relief
10 against the new owner, an unlawful detainer action by the new
11 owner against Mr. Shokohi, and an action by the City of
12 Berkeley against 1080 Delaware to enforce the pre-petition
13 agreement requiring Debtor to provide ten units for low income
14 tenants at the property. The first three of the actions have
15 been stayed pending the outcome of this adversary proceeding.
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18 On February 20, 2013, this adversary proceeding was filed
19 in the second bankruptcy case.⁹ On October 13, 2013, this
20 adversary proceeding was transferred to the undersigned judge.
21 This Court granted 1080 Delaware's *Motion to Intervene* on
22 January 21, 2014.
23

24 At the hearing on April 21, 2014, this Court determined
25 that section 549 applied to the September 5, 2011, lease
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27 ⁹ *First-Citizens Bank & Trust Co. v. Emil Shokohi (In re Berkeley*
28 *Delaware Court, LLC)*, Adv. Case. No. 13-04219, Doc. 1 (Bankr. S.D. Cal.
Feb. 20, 2013).

1 agreement. Nevertheless, the Defendant has been living in the
2 property over the last several years, and First Citizen's
3 initial efforts to terminate the lease under state law have
4 caused the tenant to raise defenses under California landlord
5 tenant law, and to assert claims for affirmative relief under
6 that law.
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8 Consequently, whether section 549 renders the lease
9 agreement void or voidable may affect the rights of the parties
10 and the disposition of the state court claims.

11 Discussion

12 The Plaintiff-In-Intervention contends that although the
13 question has no legal import because the Court has already
14 ruled in its favor on the motion for summary judgment, the
15 Court should find the lease void ab initio. The Plaintiff-In-
16 Intervention asserts that sections 549 and 362 work analogously
17 to protect from improper transfers of the estate, and
18 therefore, their effects should be the same, i.e. a lease found
19 in violation of section 549 should be void ab initio.
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21 Defendant, however, argues that nothing in the language of
22 section 549 permits a court to find a prohibited transaction
23 void ab initio. As support for this proposition, Defendant
24 highlights the differences between sections 549 and 362 as
25 discussed in at least one Ninth Circuit opinion. See generally
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1 *Burkart v. Coleman, (In re Tippet)*, 542 F. 3d 684, 691 (9th
2 Cir. 2008). Defendant asserts that these differences require
3 that a court construe section 549 to render transfers voidable
4 rather than void.

5 There is nothing in the language of section 549 or 550
6 (effect of avoidance) that expressly states that a judgment
7 determining that a transaction is in violation of section 549
8 is affective retroactively. Nor is the term "avoid" so defined
9 by the Code.
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11 As the parties' papers demonstrate, however, an effective
12 contrast may be drawn between the effect of and purpose behind
13 section 362, and that of section 549.
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15 The Ninth Circuit has long held that violations of the
16 automatic stay are void, not voidable. Although such language
17 is not provided expressly in the statute, the conclusion that a
18 violation of the stay is void is consistent with the purpose of
19 the stay, and supports the policy behind it. *Schwartz v.*
20 *United States (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir.
21 1992).
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23 The Ninth Circuit in *Schwartz* identified an "important and
24 fundamental purpose of the automatic stay" as protecting
25 debtors from their creditors while bankruptcy proceedings are
26 underway. The court stated "[the stay] is designed to protect
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1 debtors from all collection efforts while they attempt to
2 regain their financial footing." *Id.* This holding is
3 consistent with Congressional intent. See H.R. Rep. No. 595,
4 95th Cong., 1st Sess. 340 (1978) ("The automatic stay is one of
5 the fundamental debtor protections").

6 The Ninth Circuit has unequivocally held that "[t]ransfers
7 in violation of the automatic stay are void." 40235 Washington
8 St. Corp. v. Lusardi, 329 F.3d 1076, 1080 (9th Cir. 2003).
9 This is necessary to guarantee that the sweeping protections
10 offered by the automatic stay are effective. *Schwartz* at 570.
11 Requiring the debtor to take affirmative actions to receive the
12 benefits of the automatic stay would render section 362
13 significantly less effective. *Id.* (If violations of the stay
14 are merely voidable, debtors must spend a considerable amount
15 of time and money policing and litigating creditor actions.");
16 see also *In re Tippet*, 542 F.3d 684, 691 (9th Cir. 2008) ("We
17 concluded that the purpose of the provision . . . could be
18 vindicated only if all violations were rendered void, not
19 merely voidable."). The legal consequence of a transfer being
20 void is to say the transfer is "without effect." See *Lusardi*
21 at 1080.

22 The prohibition on post-petition transfers of section 549
23 serves a different purpose than the section 362 automatic stay.
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1 The automatic stay offers broad protections to allow the
2 bankruptcy process to function; the avoiding powers afforded by
3 section 549 allow for a specific wrong to be corrected,
4 including one perpetrated by the debtor. *Lusardi* at 1081
5 (“[t]he purpose of section 549, in contrast [to section 362],
6 is to provide a just resolution when the debtor himself
7 initiates an unauthorized postpetition transfer. The general
8 rule in such situations is that the trustee is authorized to
9 avoid the transfer in order to protect creditors.”).

11 Because of this different purpose, section 549 – and
12 analogous code sections 546, 547, 548 et. al. – function
13 differently than the section 362 automatic stay. These
14 sections create litigation tools. By definition, an action
15 brought under section 549 requires findings of facts, and legal
16 conclusions to reach a determination, and a court decree to be
17 enforceable. Section 549 actions are subject to a number of
18 considerations inapplicable to the automatic stay. The
19 avoidance power created by section 549 is subject to a statute
20 of limitations. 11 U.S.C. § 549 (d) (2012). The ability to
21 avoid a transfer by invoking section 549 can be rebutted by
22 affirmative defenses. *Id.* at § 549 (c). Furthermore, a trustee
23 has the discretion to choose not to bring an action to avoid a
24 transfer under 549.

1 Because section 549 has a different purpose and functions
2 differently than section 362, transfers falling under section
3 549 are not void as a violation of the automatic stay. Instead,
4 section 549(a) transfers are voidable. *In re Jim L. Shetakis*
5 *Distrib. Co.*, 401 F. App'x 249, 251 (9th Cir. 2010). In
6 *Shetakis*, the Ninth Circuit determined a postpetition lease and
7 option to purchase that may be avoided pursuant to section
8 549(a) was voidable and not void. *Id.* According to the Ninth
9 Circuit, "unauthorized transfers of property initiated by the
10 debtor are voidable by the trustee under section 549." *Id.*

11
12 The Ninth Circuit has recognized that there are situations
13 in which section 362 and 549 overlap. *See Tippet* at 691. A
14 transaction that is voidable under 549 may also be in violation
15 of the section 362 automatic stay provision. However, section
16 549 and 362 are not in conflict. The language and legislative
17 purpose of section 549 provide for its appropriate application.
18 Frequently, avoidance under section 549 is appropriate when the
19 debtor is a willing participant to the transaction. *Id.*

20 Conclusion

21 Without statutory language to the contrary, legal
22 judgments are effective as of the date issued. Section 549
23 contains no language to indicate that the effect of a 549
24 avoidance judgment was intended to be retroactive. Therefore,
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1 and for the reasons set forth in this Memorandum, a transfer
2 found to be in violation of section 549 is avoided as of the
3 date the court issues a judgment of that finding, and not
4 before.

5 Unlike a void transfer under section 362, a transfer that
6 is voidable remains effective until action is taken and a
7 judgment is entered. Such a transfer, therefore, is not
8 totally without effect, but is rendered ineffective by a ruling
9 of the court avoiding the transfer.
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11 The Plaintiff-In-Intervention is directed to prepare a
12 form of Judgment consistent with the Court's ruling as stated
13 on the record during the April 21 hearing and consistent with
14 the conclusions reached in this Memorandum.
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16 ***END OF MEMORANDUM***
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